

MEETING RECORD

NAME OF GROUP: PLANNING COMMISSION

DATE, TIME AND PLACE OF MEETING: Wednesday, April 4, 2001, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska

MEMBERS IN ATTENDANCE: Jon Carlson, Linda Hunter, Gerry Krieser, Patte Newman, Greg Schwinn, Cecil Steward and Tommy Taylor; (Russ Bayer and Steve Duvall absent). Kathleen Sellman, Ray Hill, Jason Reynolds, Kay Liang, Jean Walker and Teresa McKinstry of the Planning Department; media and other interested citizens.

STATED PURPOSE OF MEETING: Regular Planning Commission Meeting

Chair Russ Bayer called the meeting to order and requested a motion approving the minutes for the meeting held March 21, 2001. Motion to approve made by Carlson, seconded by Hunter. Motion to approve carried 6-0: Carlson, Hunter, Krieser, Newman, Steward and Taylor voting 'yes'; Schwinn abstaining; Bayer and Duvall absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION:

February 7, 2001

Members present: Carlson, Hunter, Krieser, Newman, Schwinn, Steward and Taylor; Bayer and Duvall absent.

The Consent agenda consisted of the following items: **CHANGE OF ZONE NO. 3308, CHANGE OF ZONE NO. 3317 AND SPECIAL PERMIT NO. 1905**

Hunter moved to approve the Consent Agenda, seconded by Krieser and carried 7-0: Carlson, Hunter, Krieser, Newman, Schwinn, Steward and Taylor voting 'yes'; Bayer and Duvall absent.

CHANGE OF ZONE NO. 3315
FROM R-4 RESIDENTIAL TO I-1 INDUSTRIAL
ON PROPERTY GENERALLY LOCATED
AT SO. 1ST & 'L' STREETS.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Planning staff recommendation: Denial.

Proponents

1. J.D. Burt of Design Associates, 1609 N Street, testified on behalf of the applicant, Dennis Bennett, and Phil Durst, the owner of Lincoln Auto Auction. Lincoln Auto Auction is located on 1st Street south of "O" on the west side. Construction was completed in 1999 and Mr. Durst operates an auto auction on Wednesdays. When he purchased the property, he found out that a portion of his industrial zoned property located at the southeast corner of the site was zoned residential. He moved forward with the project and Design Associates prepared a building plan similar to the handout which displayed the R-4 area and the existing fence around the property. When Durst made application for a building permit on this site, he was worried about security for his merchandise and the property of others. The building permit was submitted to the city and Durst was advised that an 8' fence would not be allowed where the existing 6' fence was located because of the residential zoning. When Durst discovered that he could not have an 8' fence along the residential zoning he sought this change of zone.

Burt testified that another issue is loss of use. There is residential property that is 25' wide at the north and 29' at the south that is zoned inappropriately for the adjacent use. There is a 20' side yard requirement for the I-1 zoning when abutting residential to provide an adequate buffer between nonconforming land uses. The handout shows the area that is not usable because of the residential zoning.

Burt has discovered recently that through the years there have been conflicts between the neighbors for whatever reason, right or wrong. He submitted photographs showing the 8' poles and 6' fence that exist on the Durst property and showing the existing fence on the residential property. This owner is not using the residentially zoned area at this time.

Burt noted that Durst owns one of the three residential zoned lots along 1st Street and has created a drainageway to help eliminate some of the drainage problems through this area.

Figure 3 of the handout shows the proposed sideyard with 20' buffer. This does not require any deviations from the I-1 zoning. This application is an attempt to get the zoning line to coincide with the existing lot line. Burt also submitted an excerpt from the zoning ordinance which allows the zoning line to align with existing property lines.

Opposition

1. Teri Pope-Gonzalez testified in opposition. She spoke for her friends, her family and her neighborhood. She submitted a petition containing 89 signatures in opposition and submitted photographs showing a demolition derby that was conducted on the subject property, after which she filed a complaint with the Governor's office. The demolition derby occurred right behind her home. If she agrees to the industrial zoning, what will occur on the property? The Fire Department even came out because there was so much dirt they thought there was a fire.

The Auto Auction use is supposed to be 25' from the fence. She has complained to Building & Safety many times. This is an older, lower income community; it is a working class and minority community. Her family has been in the neighborhood since 1931, and they have been homeowners at 349 So. 1st since 1954. This is her husband's childhood home and they will retire there. There were no problems until Lincoln Auto Auction came there. She has been to the Planning Dept. and talked with the staff who are also recommending denial. The Salt Creek Community Organization will also be opposed to this change. She is willing to compromise, but does not want to change the zoning. The applicant has not met with her. If he can't live without the 25' she would agree to at least a 15' buffer. She has a notebook of complaints. This is not just a housekeeping issue. The complaints include water drainage caused by all the concrete; mosquitoes; parking on the street; etc. They have finally discontinued parking in front of her driveway. People come to the auction Tuesday night, all day Wednesday and Thursday, taking up all of the street parking. In addition, Gonzalez does not believe she should have to put up with their garbage.

Approximately 15 people stood in the audience in opposition. The petition contains 89 signatures in opposition.

2. Steve Larrick, 920 So. 8th, President of **South Salt Creek Community Organization**, testified in opposition and submitted his testimony in writing. The Neighborhood Action Plan developed in 1992 in cooperation with the Urban Development Department specifically sought to "provide buffer between conflicting land uses (residential and commercial/industrial)." This proposed change of zone is counter to these ongoing efforts. What is needed is a 15' green buffer between the west lot line of the residential properties along 1st Street and the tall barbed wire fence for industrial uses to the west. This would allow for planting of trees and bushes.

This would diminish the negative visual impact and the considerable impact of stormwater runoff from the massive parking lot to the west. He referred to a like situation in the Clinton neighborhood. The Gonzalez family has been a pillar in our community for more than 50 years. They seek to protect and enhance the quality of life for all of us.

3. Joe Gonzalez, who lives adjacent to the parking lot, testified in opposition. He does not understand how they got a permit to put their cars there in the first place. He is fearful how the property will be used with industrial zoning. He is fearful it will provide another access and a roadway.

Response by the Applicant

Burt suggested that the change of zone is an issue separate from the demolition derby. This is a land use issue. The I-1 zoning has a 20' buffer requirement. If this is approved, Durst will need to comply with the 20' buffer requirement. The neighbor is only asking for a 15' buffer. He has discussed relocating the fence with the owner, but he already has the posts in the ground and he is not prepared to spend the money to move that fence at this point in time. The issue with the fencing is vandalism problems that have been experienced. Burt requested that the Commission recommend approval of this change of zone request in order to align the zoning line with the lot line.

Steward inquired whether the owner was aware of this discrepancy between the property line and zoning line when the property was purchased. Burt believes that he was but does not state that as fact. Steward believes, then, that the owner should have been aware that a 6' fence would have been required—not an 8' fence. Burt does not believe he probably knew that. The property is in the floodplain and will not be developed as residential. He probably was not aware of the fencing requirements. Steward believes it is obvious that there was residential zoning next to it.

Carlson believes the neighbors are concerned about whether some mechanism exists to honor the buffer space. Moving the fence would be a start. What about something that would act as a sound buffer as well as green buffer? Burt stated that the owner has purchased privacy slats that will be put on the entire fence. Carlson suggested that the neighbors would like to have something environmental. Burt pointed out that there is space between the fences and he will discuss the landscaping with the owner. This is a change of zone, however, not a special permit. He has not yet discussed landscaping with the applicant.

Staff questions

Steward clarified with staff that if the zoning line stays where it is, then the owner is required to have an additional 20' buffer. That would then mean about a 45' buffer between the actual use and the property line. Kay Liang of Planning staff concurred. Steward asked whether there is any mechanism to require landscaping in that 20' buffer. Liang responded that the existing use on the property is allowed by right. It is not a special permitted use. The only mechanism is through the building permit process. Unless the developer and the residents can work something out, there is not a mechanism through the regulations to require a landscape screen.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Newman moved to deny, seconded by Hunter.

Newman would like to see the owner work with the neighborhood association to put in some sort of green buffer zone, but until that happens she does not think the zoning should change.

Hunter believes that this is a very clear example of a mistake in allowing this kind of development to back up to residential. The buffer between the two fences is almost a joke.

Carlson noted that this is the case where a property owner who is illegally making use of the property is seeking to make it a legal use, and the neighborhood is proposing a mechanism by a strong buffer, but that is not what is before us. He agrees with denial.

Steward believes the fence was going to be 8'. He appreciates the security issue, but the 8' fence has to be on the zoning line—not on the property line.

Motion to deny carried 7-0: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn voting 'yes'; Bayer and Duvall absent.

CHANGE OF ZONE NO. 3316
FROM O-3 OFFICE PARK TO "P" PUBLIC USE
ON PROPERTY GENERALLY LOCATED
AT NO. 46TH AND "R" STREETS.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Newman and Schwinn; Taylor, Bayer and Duvall absent.

Planning staff recommendation: Approval.

Proponents

1. **Kerry Eagan, Chief Administrative Officer for the Lancaster County Board of Commissioners** presented the application. The County purchased the building at No. 46th & R which will be used for the Election Commission. The existing zoning is O-3 with use permit. The building will be modified and the Board chose to seek "P" zoning since the property to the north is also owned by the County and zoned "P". It made more sense to change the zoning rather than amend the use permit. There will be no setback violations.

There was no testimony in opposition.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved approval, seconded by Newman and carried 6-0: Carlson, Krieser, Hunter, Steward, Newman and Schwinn voting 'yes'; Taylor, Bayer and Duvall absent.

CHANGE OF ZONE NO. 3306
FROM R-1 RESIDENTIAL AND R-2 RESIDENTIAL
TO R-T RESIDENTIAL TRANSITION
and
USE PERMIT NO. 138
FOR SIX 5,000 SQ. FT. OFFICE/MEDICAL BUILDINGS
ON PROPERTY GENERALLY LOCATED
AT SOUTH 56TH STREET AND WALTZ ROAD.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Planning staff recommendation: Approval of the change of zone and conditional approval of the use permit.

Proponents

1. **Brian Carstens** appeared on behalf of **Bill Krein**, the applicant. About 7-8 months ago a similar use permit and special permit came before the Planning Commission. This application has been revised at the request of the City Council and now includes a plan on the west and south side of Beal Slough that is a little more sensitive to Beal Slough as well as the existing tree masses. Carstens requested that Condition #1.1.15 be amended, "Reduce the width of the south Private Driveway to 25'." (instead of 21'). The submittal had shown 27' and Carstens believes that staff will support 25'.

Comparing the previous application with the revised application, Carstens explained that they have basically deleted one building and saved the existing tree mass. The density on the south and west side of Beal Slough has been reduced.

Carlson inquired about impact on floodplain. Carstens advised that all grading is outside of the floodway. There will be no fill in the floodplain. They are not importing any fill. As far as the roadway over the channel, the applicant has a no net rise letter on that issue.

There was no testimony in opposition.

Staff questions

Hunter inquired about the staff conclusion that the proposal is inconsistent with the Land Use Plan but complies with the general concepts of the Comprehensive Plan. Is this recommended development in this area? Jason Reynolds of the Planning staff explained that the Land Use Map shows a different color coding indicating the type of land use generally recommended for the area. In this case, it showed urban residential and natural environmentally sensitive along the Beal Slough drainage corridor. The Comprehensive Plan states that there are other zoning criteria that can be used to analyze something that is not consistent with the Land Use map and that criteria is outlined in the staff analysis. Staff finds that this application is generally compatible with the zoning criteria and thus is then consistent with the principles of the Comprehensive Plan.

Steward observed that even on that finer point of protection of environmental conditions, it would be true that the urban residential might have proposed greater damage to the tree mass and ground coverage than this use. Reynolds agreed that it is certainly a possibility.

Reynolds indicated that the staff agrees with the proposed amendment to Condition #1.1.15.

Public hearing was closed.

CHANGE OF ZONE NO. 3306

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved approval, seconded by Krieser and carried 7-0: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn voting 'yes'; Bayer and Duvall absent.

USE PERMIT NO. 138

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved approval, with conditions, with the amendment to Condition #1.1.15 as requested by the applicant, seconded by Steward.

Newman thinks she likes this better now. She didn't like it the first time around.

Carlson expressed appreciation to the developer for being sensitive to the tree masses and the sensitive area of Beal Slough. He believes this will probably work.

Motion to approve the Planning staff recommendation of conditional approval, with amendment to Condition #1.1.15, carried 7-0: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn voting 'yes'; Bayer and Duvall absent.

WAIVER OF DESIGN STANDARDS NO. 01001

TO WAIVE THE LOT WIDTH TO DEPTH RATIO

ON PROPERTY GENERALLY LOCATED

AT S.W. 25TH STREET AND W. WASHINGTON STREET.

PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Planning staff recommendation: Denial

Proponents

1. Tom Cajka of Ross Engineering presented the application and showed the overall site plan for the area. The area in question is Lots 3, 4 and 5. The outlot is tucked in behind these lots. The waiver will allow the lot lines to extend up to the boundary which would then make the lots deeper. The reason for this request is that it would allow the lots to utilize the additional depth for a rear yard and would eliminate the maintenance by the homeowners association. Due to the location, the likelihood of the property being used for the rest of the development

would be minimal because it is tucked in back behind the existing lots. The purchasers of the lots would probably not appreciate other people being in their back yard. This would benefit the property owners of Lots 3, 4 and 5. Cajka believes this would make a better overall plan and would eliminate some possible problems in the future.

Steward inquired why the waiver was not proposed with the original preliminary plat. Cajka's response was that they encountered a lot of problems in getting this plat approved. They had originally shown it going all the way back and when there were other problems with the noise contours and the airport environs district, for purposes of saving time, the developer agreed to go ahead and leave it showing the outlot and get it approved, and then come back for this waiver separately. Things did not proceed as quickly as they had hoped and this plat has already come back a second time because of the problem with the existing residences on Washington and 27th Street which resulted in adding more lots.

The land use to the north is single family residential. To the east, there is a large acreage with a single family house further north. To the west there is a drainageway that goes across West A Street. Steward noted that in fact there is quite a bit of open ground around the three lots. Cajka noted that there is a single family house on Lot 95, with single family homes along "A" Street.

Schwinn clarified that there would still be outlots in the subdivision that will need to be maintained by the homeowners association. Cajka concurred and pointed to the outlot where the detention cell is located and where it drains through on the north.

There was no testimony in opposition.

If maintenance is the issue, Carlson does not see why it is problem. Jennifer Dam of Planning staff explained that the issue is that the development could have been designed to meet the standards. Lots 3 and 4 could be put together; the lot line for Lot 5 could be adjusted and it could potentially conform. The staff analysis is that there could have been ways to design where a waiver would not have been needed. Staff does not see unusual circumstances to warrant granting the waiver.

Steward observed that if this remains as an outlot, those three lots are connected. Dam stated that it becomes part of Outlot A which is west of the proposed layout. Immediately south of Outlot A across West Washington is Outlot B which is the detention.

Response

Cajka stated that it is more than just a maintenance issue. We are trying to alleviate potential problems in the future for the people living in those three lots with the open space in the back. For people purchasing the lots, we think it would be more beneficial to them to have the

additional land as part of their back yards. In essence, it probably would end up being their back yard, but it would be community property and anyone could go back there.

Hunter thought these were townhomes. Cajka clarified that Lots 3 and 4 are townhomes but are on their own individual lots. He agreed that this waiver would allow a bigger building. However, Cajka is not requesting to change the building envelope.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Steward moved to deny, seconded by Newman.

Steward agrees with the staff observation and he does not see any public imperative. This was approved and reviewed before and, if a critical issue, it should have come up at that time. The lots provide some potential for recreation; at least they are physically connected. This should have been anticipated and he does not believe the property ownership circumstance alleviates the use condition.

Carlson thought the remedy could be to combine the two lots.

Newman's concern is that there are acreage type houses around it, and this would open up the possibility of putting one of those sheds for garden tools in the back. If it remained as an outlot that could not happen. She does not know whether that would be an issue, but it is possible.

Schwinn stated that he could go either way. He lives in a situation that is exactly like this and he likes the outlot being in the back yard and he would prefer it being an outlot rather than his property. He does not see any downside whatsoever. Having the open space and green space between the subdivision and whatever comes in the future is going to be just fine.

Motion to deny carried 6-1: Krieser, Hunter, Steward, Taylor, Newman and Schwinn voting 'yes'; Carlson voting 'no'; Bayer and Duvall absent.

MISCELLANEOUS NO. 01003
TO AMEND THE ORDINANCE APPROVING
THE COUNTRY MEADOWS FINAL PLAT
TO REDUCE THE BUILDING SETBACK
FROM 50' TO 20' WHERE THE LOTS ABUT OUTLOT "F",
ON PROPERTY GENERALLY LOCATED AT
SOUTH 66TH AND PINE LAKE ROAD.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Planning staff recommendation: Denial.

Proponents

1. **Rick Krueger** testified on behalf of the applicants seeking to change the side yard setback on the Country Meadows final plat. The situation only affects the two lots—Krueger and his neighbor. The Country Meadows lots are 1-acre in size and under covenants, the owners are allowed to install an outbuilding and that is Krueger's ultimate intention. All of the homes are built now. There will be a roadway laying on top of the outlot. This request would allow Krueger and his neighbor to put their out-buildings closer to the outlot. Currently, it would be considered a side yard except for the 50' lot line on the final plat. Krueger has received approval from the Country Meadows Homeowners Association.

Newman inquired about the width of the right-of-way. Krueger believes it is 60'.

Hunter referred to the aerial photographs and inquired about the area behind the two lots. Krueger advised that it is an outlot that the association owns. It goes down off 66th Street between the two properties and heads generally north for future connection. The outlot it runs through does not have any density units assigned. He believes it is an outlot in perpetuity. He does not believe it could be designed for a home.

There was no testimony in opposition.

Staff questions

Steward sought verification that Outlot A and Outlot B would never be built upon. Kay Liang of Planning staff advised that on the original plat there is a utility easement over the outlot so if it would be preliminary platted it could be developed. Steward's concern is that we are setting up a key condition with this more narrow distance between r.o.w. and setback that will impact and affect future development along that roadway. Liang offered that if we agree with

the reduction of the setback along Outlot F which is designated as future roadway, it would set a precedent for future development. In further response to a question by Steward, Ray Hill of Planning staff advised that if Outlot F was dedicated as a public street, the setback would be 50'. Under the present AGR zoning district the front yard is 50'. The intent of Outlot F was to provide access to the common open space and to provide access to properties that now front upon Hwy 2 to provide other means of circulation throughout the section.

Schwinn observed that if this neighborhood were to become R-1 zoning in the future, the front yard setback would be 30'.

Schwinn inquired whether the staff really foresees a major problem with that 20' setback off the street if the property were developed in the future. Hill responded, stating that the property is zoned AGR and the required front yard is 50'. If the zoning is changed to zoning which requires a smaller front yard, the staff would not have objection to changing it at that time.

Response by the Applicant

Krueger clarified that he is not asking for a change of zone. It is currently an outlot and as such is not a front yard, so he does not believe they are asking for anything extraordinary. The Country Meadows homeowners all have an interest in the outlot and it has never been the intention that it would ever be developed. And Krueger cannot conceive that there would be additional houses back there. In the subarea plan for 84th and Hwy 2 this is shown as green and open space.

Steward inquired whether the applicant would accept 30'. Krueger stated that "anything would be great". He requested 20' because the normal side yard setback in AGR is 15', so at 20' it is beyond what would normally be a side yard setback in AGR. He has received approval from the homeowners association to go to 20', so he believes that should carry some weight because the Country Meadows Homeowners Association has been very active in land use issues.

Hunter clarified that this will only affect two lots. Krueger confirmed.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved approval, seconded by Carlson.

Hunter will vote in favor because nothing will be built without approval of all the homeowners.

Carlson noted the homeowners association support. Although he is sensitive that it could be a road, the question is whether it will be a road and it looks like that possibility is pretty slim. He wants to be sensitive in the future for that situation, but if the developer and neighborhood association are on board, there does not appear to be a imminent public reason to deny.

Newman's concerns are whether it is a side yard setback or a front yard setback, and whether there will be sufficient r.o.w if there is ever a road, but she believes there is enough room.

Steward observed that the city has been and in many cases insists that developers make potential connections out of subdivisions to establish roadway systems for reasons of public interest when there may not be an immediate owner public interest being expressed. Just because people are not here to support or resist is not reason to disagree with the staff recommendation. He believes it ultimately might be a roadway and the intent was to ultimately provide potential for connection to the south between 56th and 70th. If we set up a pattern, we further inhibit that opportunity by this yard frontage, which would become a front yard. He will vote against the motion.

Schwinn noted that Outlot F is an outlot and it is not a r.o.w. for a street as of yet. It was laid out that way but he cannot imagine the neighborhood association ever allowing that to be released. The land on Outlot A and B is very, very low and would probably never be possible to develop anyway, even if they got every homeowner to agree. He will vote to approve especially since it is the 20' that is the front yard requirement in many of our zoning districts.

Motion to approve carried 6-1: Carlson, Krieser, Hunter, Taylor, Newman and Schwinn voting 'yes'; Steward voting 'no'; Bayer and Duvall absent.

SPECIAL PERMIT NO. 1165B
TO EXPAND A SPECIAL PERMIT FOR
HISTORIC PRESERVATION TO INCLUDE
PROPERTY AT 1301 H STREET.

CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 4, 2001

Members present: Carlson, Krieser, Hunter, Steward, Taylor, Newman and Schwinn; Bayer and Duvall absent.

Ed Zimmer of Planning staff advised that he has been in contact with both the applicant and the adjacent owner. He does not see any progress being made to resolve this item. He has also seen draft revisions to the plan as called for by the conditions of approval in the staff report.

Proponents

1. **Ray Lineweber**, the applicant, concurred with Mr. Zimmer. He does not support any amendments from the opposing side; there is no easement on his property, Lot 5; there is no contract on Lot 5; and this is not about Lot 4—it is about Lot 5. Lineweber stated that he will comply with the recommendations of the Planning staff and will construct the fence and redesign the lot accordingly.

Lineweber noted that there have been concerns about loss of the mature trees on Lot 4, but he pointed out that just to the west of his property on Lot 6 we lost a big locust tree last week. Lineweber indicated that he will spade in two of the four trees where the locust tree was lost; and the others will go into the medians on Stratford, so the trees will not be lost. They will be spaded in elsewhere.

Hunter asked Lineweber specifically whether there was ever any understanding of exchanging the parking stalls with that building when he received the special permit. Lineweber stated that it is a bit vague—all he can relate is what the lease provided. Hunter then asked, “when you went for the special permit, were you granted that permit with an understanding that that lot would be used between both buildings?” Lineweber believes they were granted the special permit based on the conditions of a lease. The lease was attached to the permit.

Opposition

1. **Mark Hunzeker** appeared on behalf of **Mark Becker**, the owner of the Capitol Park Office Building adjacent to the parking lot in question on Lot 5. At the last hearing there was some discussion after the hearing that indicated some misunderstanding about parking requirements and some of the economics of this transaction. Hunzeker purports that it is not the Planning Commission’s responsibility to determine who is right and wrong, reasonable or unreasonable. The parking requirements for the office building are 1 per 1200 sq. ft. of office space. There is more than enough parking on the Capitol Park side of the property line in order for that property to meet the zoning requirements. This is not an issue of whether or not the office building will be in compliance.

There was some speculation in the discussion that Becker was simply unwilling or too stubborn to pay the rent necessary to get the parking that he was trying to get. The original lease contained a series of escalators in the original amount for the leasing of parking spaces. By the time Becker bought the property, the escalators had reached a point where the individual parking stalls were leased for \$150 per month per stall. That is roughly three times or more the market rent for parking in this part of town. Escalators are built in by people

who don't have any idea what the future may hold and to protect against some unreasonable changes in economic circumstances, but they are routinely renegotiated if they get out of whack. Hunzeker believes this is a situation where they are way out of whack. Lineweber is leasing some spaces to the office building tenants for \$50.00 per month.

Hunzeker then reviewed a proposal for two or three alternatives that his client has submitted to the applicant. This is not a situation where the Planning Commission should be trying to decide which of these people are being reasonable or unreasonable, but it is the Commission's job to deal with the special permit process. This is a special permit application which is needed by Lineweber to legitimately and legally maintain the Billy's Restaurant use of the property, and he is proposing as part of that to literally erect a "spite" fence. Part of the reason the Commission is here is to administer that special permit process in a way not to damage abutting property or the surrounding area. There needs to be some consideration of the four mature trees and some adjustment made.

Hunzeker re-submitted the proposed amendments to the conditions of approval that he submitted at the last meeting, giving the owner of Lot 4 permissive use of the driving aisle to access parking spaces on Lot 4. The Commission needs to do something consistent with the use by both properties, and not just put the Lineweber property into compliance with the special permit.

Taylor asked whether Hunzeker is suggesting that what Lineweber is charging for parking spaces is exorbitant. Hunzeker does not know the right number, but you can lease all the parking you want in this part of town for \$50.00/month per stall. There was an agreement which ran it up to \$150.00/mo. per stall. Becker determined that to be excessive and terminated the lease, and they have since been fighting over access. Hunzeker believes all the circumstances that surrounded the demolition of the building that was on this parking lot, the construction of the parking lot and the maintenance for the last 15 years all indicate that the owner of that apartment building at the time thought he was going to have access to his parking. The special permit is seeking permission to put up a "spite" fence and cause Becker to tear down trees and put concrete in one of the few remaining areas of green space. It would also eliminate about 7 parking stalls, all of which is to the detriment of the entire area.

Taylor wondered whether people have been parking there for free in the meantime. Hunzeker stated no, there are people who are leasing spaces from Lineweber that are tenants of Becker's building. All Becker needs is access to the parking stalls that are on the Becker property.

2. David Hunter, President of State Title Services, testified in opposition. He was one of the original owners of the property back in 1986. When he developed that building, there was a lot of good faith negotiations with the city and with Lineweber. The Dawes house was on the corner (now Billy's), and the apartment building was there (now Capitol Park). There

were also a couple “real beaters” sitting there that were close to being red-tagged. The agreement negotiated with Lineweber at the time was to tear down the property; put the parking lot in conformance (“we” paid all the expenses to tear down the building, to maintain the parking lot and to pave the parking lot, plus \$13,000 rent for the privilege of using the parking lot we put in and paid for). There was one curbcut approved by the city. There is a letter signed by Ray Hill which indicates that the parking lot lease agreement was approved by the city, and that the Planning Department be contacted if there is any change in the lease arrangement. Hunter purports that there was a requirement for the lease. This was a 10-year lease with multiple 5-year options. There were no specific calculations for escalators. What took place was a built-in “imagination” of escalators. What is taking place here, if the curbcut is denied, all of the trees in front of the building (Capitol Park) and the parking will be right up against the building with two curbcuts. If this special permit is granted, it will look like a disaster zone. The Planning Commission is being used as a pawn to escalate the civil negotiation to a different level. Hunter has no financial interest in this. If he had this lease to write over, he would have done so. We made some errors. There was some handshaking that went on. The one word “perpetual easement” should have been in the lease for the driveway and curbcut. We assumed that nothing would change. There is some potential civil litigation that there may be an implied or prescriptive easement. Hunter encouraged the Commission to not approve the extension of this special permit abutting up to the other building. There was a reason the city wanted us to negotiate. Lineweber is currently receiving \$50 /mo. per stall and he wants an additional amount for ingress and egress.

In addition, Hunter believes another issue is that the lease clearly states that Lineweber has to sell and convey the improvements of this property and this has not occurred. Let the parties negotiate it from a civil perspective. The Commission should not get involved.

Response by the Applicant

Lineweber stated that he is not asking for \$1500 for them to have access each month. They leased the entire lot when they originally did the parking lot. In that lease there were clear instructions that they would obtain all the permits and tear down the buildings, and for that he received monthly rental payments. Still, it is a cost of doing business and they don't want to accept it. It is a matter of doing the right thing. Lineweber does not believe he has ever done a project that has become a disaster area. Lineweber wants 2 ½ ' for low shrubs and perennials rather than no setback. The wrought iron fence will be the same that is there and will give the property its own definition. The bottom line is that it is his property and all he wants people to do is respect that.

With regard to David Hunter's comments, Lineweber indicated that he has done a traffic study on the number of stalls that are actually needed for the restaurant, the result of which indicates he has sufficient parking. The tenants of the office building came forward to rent the stalls after the lease was terminated. They did not use any of the stalls on Lot 4 during the period he did the traffic study and he had sufficient parking.

Lineweber is concerned about the \$150/mo. per stall allegation. He does not know who is figuring that. That is completely out of line. If indeed they were to lease the entire lot today, they would get the entire lot with 13 stalls. That does not equate to \$150/mo. per stall. Lineweber challenged the Commission to please consider his petition to amend the special permit rather than the Becker dilemma. He believes the fence will look very, very nice there.

Staff questions

Newman asked for clarification as to exactly what the Commission is voting to do. Is it to extend the line of the historic property? Does that mean the parking lot will remain as is, or that he is required to dig up half the parking lot? Ed Zimmer of Planning staff clarified that the application is to extend the special permit to include all of Lot 5. Presently it includes Lot 6 and a sliver of Lot 5. All of the Lineweber property would be under the special permit if this application is approved. The site plan for the new expanded property is to reconfigure the parking lot on his property and construct the fence. If the special permit is approved, the applicant can then do what the special permit site plan allows, and that is why we began the process with the Historic Preservation Commission which is charged to look at appropriateness of historic property.

Steward observed that the applicant can do what the site plan permits or he can do nothing. Zimmer believes that the special permit has a condition of implementing the site plan. Under the typical conditions, the permittee is required to carry out the special permit and the site plan is part of the conditions attached to the approval. He does not believe it is optional.

Rick Peo of the City Law Department clarified that Lineweber had two options. He could have just expanded the boundaries of the permit for Billy's to include the present parking lot, but he chose to go beyond that and proposed a new arrangement for parking to allow him to install a barrier fence along the east property line. That was at the staff's direction in prior meetings regarding the self-help efforts of putting up the fence. We ask people to conform to the site plan. If he proposes an altered parking arrangement and a fence, we would expect him to do that or come back and amend the special permit again.

Assuming that some circumstance of fate of powers larger than our own would cause this issue to be settled, Steward wondered whether the permittee has to come back. Peo observed that part of the conditions of the special permit is signing a letter of acceptance. If the permittee did not accept, he would be back in the same situation he is today. If he takes advantage of it, then he would have to come back and amend in order to do something else.

Carlson inquired whether the Planning Commission has any latitude to modify the request as to the boundary. Peo believes that the Commission could approve less than what was requested, i.e. just to expand the dimensions to include all of Lot 5 with Lot 6. Carlson wondered whether the applicant would then have to come back to ask for further site modifications. Peo believes that the parking lot arrangements and driveways could be handled administratively rather than through this body. The fence issue is tough. Theoretically, a property owner has a right to put up a fence. The reason we would not allow the fence before was because it was a shared parking arrangement that got approved and the special permit did not cover that lot.

Hunter noted that a special permit is a special request for a use. When this special permit was originally granted, the parking that exists was sufficient for that restaurant. Zimmer clarified that this is the second amendment to the original special permit. The original permit was to allow a certain increased amount of commercial use in the R-8 zoning. That amendment allowed the restaurant use. In 1986, when the restaurant use was granted, the permit stated that 10 stalls should be provided for that use and 5 stalls could be by lease. It did not attach to a specific plan. It only regulated Lot 6. Hunter believes there are more than 10 spaces. Zimmer agreed that there are 5 in the back and 15 on each side of the aisle. Hunter does not believe there is a need to amend the special permit for additional parking. The existing special permit is valid for the property and valid for the use. She does not believe Lineweber is doing this because he needs more parking. Zimmer suggested that it is about regularizing the parking on Lot 5, which is zoned O-1. To attach the parking clearly to the restaurant is the purpose of extending the special permit to cover Lot 5.

Realistically, Hunter believes that there is probably a lot of option for interpretation in a court setting. She wonders whether the Planning Commission isn't being placed in the position of making a decision that probably would get litigated to an end that was really based on legal documents that were executed. Peo does not believe the Planning Commission action will affect the private legal actions that they might bring. The purpose of this action is that Lot 5 has a different zoning than Lot 6. When they came in to put Billy's in, they showed 10 parking stalls. The 5 parking stalls on the east were under a different zoning district. We were not aware of the ownership at the time. The city made it a condition of the special permit that if the permittee was going to show those 10 required parking stalls, with 5 on property under a lease arrangement, then the city wanted to see the lease. We all assumed that it was owned by the office building rather than Billy's. By the nature of the parking lot being in a different zoning district, it is only accessory to an O-1 use. To make the parking accessory

to Billy's Restaurant use, it was determined that historic preservation is allowed in O-1 and the owner needed to expand the boundaries of the permit to pick up the O-1. That makes Billy's legal. The city was being pushed to be for one side or the other. We are trying to not do that. We are just trying to say to the applicant that he cannot just do self-help. If he wants to be legal he has to expand the boundaries of his special permit, and that is what this application is about. The city wants to stay out of a legal battle.

Hunter believes that litigation could negate the permit. Peo believes the person could have fought the lease agreement without terminating it.

Newman clarified that if the Commission does not approve this application, Lineweber cannot use the property that he owns as a parking lot, although he can still put up the fence. Peo concurred. He could close down that lot and then he could put up the fence.

Public hearing was closed.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

April 4, 2001

Hunter moved to deny, seconded by Newman.

Hunter believes this whole situation is so legal bound. It will probably wind up in court no matter which way it goes. By expanding the special permit, it probably will wind up with someone determining the intent.

Newman believes that denying the special permit maintains the status quo and the negotiations will continue.

Steward believes this Commission will be making a mistake by not supporting the staff recommendation because it is a property rights issue; the individual has the right to make this request and has the right to propose the work and to expand the historic district; he does not believe the speculation about the legalities has anything to do with the responsibility and decision to be made by this body. As long as this is within the support and domain of the Comprehensive Plan--that the property owner has the right to the request and that it is justified and has been properly researched and supported by the staff--it seems the Commission is compelled to support the staff recommendation. He finds it extremely interesting that the opponents would use aesthetics and environmental issues to make a case when the same voices have been heard on the other side of the issue making a case against the environmental and aesthetics. For Steward, this is clearly a right and it is in fact a dispute that should not be taking place and that the Commission should not get involved in. The Comprehensive Plan supports this recommendation.

Carlson agreed with Steward. We have approval by the Historic Preservation Commission and a logical conclusion in the staff report.

Newman's problem with it is the green space next to the office building. She believes it is very attractive as it is. When she sees expanding concrete she does not like it and that is what will happen with this approval. Her concerns are the aesthetics.

Taylor commented that Lineweber has a compelling argument and he definitely thinks in this case that the staff recommendation appears to be appropriate and in compliance. Taylor agreed with Steward's comments.

Hunter stated that the whole reason for her motion to deny is that basically, this special permit was awarded based on a lease agreement with another property owner to share parking. And the lease still exists. If someone wants the lease not to exist or vice versa, consequently you wind up at this point. The owner's property rights were exercised when they did the special permit the first time with the agreement to do the lease arrangement with the other building that needs the parking. All of a sudden the rules are now changed. And the changing of those rules affects the original agreement.

Steward called the question.

Motion to deny failed 4-3: Krieser, Hunter, Newman and Schwinn voting 'yes'; Carlson, Steward and Taylor voting 'no'; Bayer and Duvall absent.

Steward moved to approve the staff recommendation of conditional approval, seconded by Taylor. Motion failed 3-4: Carlson, Steward and Taylor voting 'yes'; Krieser, Hunter, Newman and Schwinn voting 'no'; Bayer and Duvall absent.

This item is held over for administrative action only at the next meeting of the Planning Commission on April 18, 2001. Public hearing is closed.

There being no further business, the meeting was adjourned at 3:05 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on April 18, 2001.